

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 August 2003

BALCA Case No.: 2002-INA-248
ETA Case No.: P2000-HI-09475154/JS

In the Matter of:

HAWAII MEDICAL SERVICE ASSOCIATION,
Employer,

on behalf of

XINYU ZHANG,
Alien.

Appearance: Jisheng Li, Esq.
Honolulu, Hawaii
For the Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of computer service coordinator.¹ The CO denied the application and Employer requested review

¹ Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

pursuant to 20 C.F.R. §656.26.

STATEMENT OF THE CASE

On April 17, 1999, Hawaii Medical Service Association ("Employer") filed an application for labor certification to enable Xinyu Zhang ("Alien") to fill the position of "Computer Security Coordinator." (AF 84). A bachelor's degree in computer science or information systems was required, as was three years of experience in the job offered or five years of experience in the related occupation of network administration, systems analysis.

The CO issued a Notice of Findings ("NOF") on February 1, 2002, proposing to deny certification on the grounds that Employer had failed to document job related reasons for the rejection of U.S. workers, as required by 20 C.F.R. §656.21(b)(6). (AF 42). Specifically, U.S. worker Hill had experience as a network administrator and management information systems director since 1984, and was rejected by Employer for the lack of a bachelor's degree. The CO determined that based on his resume, Hill appeared eminently qualified, noting that the Department of Labor considers a bachelor's degree to be equivalent to about two years of experience. The CO found no evidence that a general bachelor's degree in computer science or information systems was truly necessary, and this particular applicant showed an extensive amount of senior level experience beyond that which was required, amounting to at least sixteen years of experience shown on his resume. He was found by the CO, pursuant to 20 C.F.R. §656.24(b)(2)(ii), to be qualified for the job. Employer was advised that it had to document the job-related reasons for the rejection of this applicant.

By letter dated March 5, 2002, Employer submitted rebuttal. (AF 30). Therein, Employer claimed that the position at issue fell under the category of "Specialty Occupation" which required the attainment of a bachelor's degree or higher in a specific speciality, or its equivalent, as a minimum for entry into the occupation in the United States. Employer further contended that the position, as defined by the Dictionary of Occupational Titles ("DOT"), had a Specific Vocational Preparation ("SVP") time of over four years up to and including ten years, and its General Educational

Development (“GED”) was of a level which only a college graduate would be expected to possess. Employer also argued that it had hired twelve individuals to fill this position since its creation, and all of them had a bachelor’s degree.

Even assuming that the U.S. applicant was considered, Employer determined that he had less than fifteen years of experience. Upon interviewing him, it was determined that he spent less than eight hours per week on computer-related work from 1993 to 1995, and therefore, he had less than thirteen years of work experience. Citing 8 C.F.R. §214.(h)(4)(iii)(D)(5), Employer contended that three years of specialized training and/or work experience must be demonstrated for each year of college-level training. According to Employer, this meant that U.S. applicant Hill only had the equivalent of a bachelor’s degree and less than one year of experience in the job offered, or at best, three years of experience as a network administrator or systems analyst, thereby falling short of its required minimum level of education and experience for the job. Employer also stated that based upon the responses provided by Hill to Employer’s questionnaire, it was apparent that Hill lacked the basic knowledge and technical skills to become a reasonably competent computer security coordinator. Employer conceded that it had failed to previously communicate that Hill was not qualified, however, it had assumed that his failure to have the required educational training would have been sufficient. (AF 30-41).

A Final Determination was issued by the CO on March 22, 2002, denying certification. (AF 24). Therein, the CO stated that he did not agree with the calculations made by Employer based upon Hill’s experience. Even accepting Employer’s claim that three years of experience was equal to a bachelor’s degree, the CO found that Hill’s resume showed an additional ten plus years of experience, further pointing out that the resume indicated that further history was available upon request, which history was unknown at this point. The CO pointed out that there was no disagreement regarding the SPV for the occupation or that a bachelor’s degree was the normal, expected entry level requirement. However, upon reviewing the experience of this particular applicant, the CO found that his total experience met, and in fact exceeded, Employer’s alternative requirement of a bachelor’s degree plus five years in the related occupation. Given that Employer allowed any general

information systems or computer science baccalaureate degree, the CO found no evidence that equivalent experience would not be applicable.

With regard to the test which the applicant did not pass, the CO pointed out that this test had not been previously disclosed, and the applicant could not be found to have been properly rejected for failing to pass the test, an undisclosed requirement mentioned for the first time in Employer's rebuttal to the NOF. The CO concluded that the applicant was a qualified worker who was rejected for other than job-related reasons.

Employer filed a Motion for Reconsideration dated April 22, 2002. (AF 16). It was denied on May 15, 2002. (AF 15). On May 30, 2002, Employer requested review by the Board of Alien Labor Certification Appeals ("Board" or "BALCA"). (AF 1).

DISCUSSION

In the request for review, counsel for Employer contends that the CO "mistook the standard in converting a baccalaureate degree into work experience as the standard of converting work experience into baccalaureate degree equivalency." It is Employer's position, relying upon 8 C.F.R. §214.2(h)(4)(iii)(D)(5), that three years of specialized training and/or work experience must be demonstrated for each year of college-level training required. In this case, Employer argues, the applicant needed twelve years of experience for a bachelor's degree, leaving him with only one year of work experience left to fulfill the work experience requirement of the position. Employer contends that the U.S. applicant had thirteen years of qualifying experience, adding, however, that even if he were credited with fifteen years, he would still not have enough work experience to fulfill the requirements of the position.

Employer relies upon regulations which are not directly applicable to the qualifications of U.S. applicants being considered for positions listed in labor certification applications. Title 8 *Aliens and Nationality*, and in particular that section cited by Employer, deals with the special requirements for

admission, extension and maintenance of status for certain non-immigrant classes. It does not apply to U.S. citizens and whether they qualify by experience and training for positions an employer seeks to fill with an alien.

Section 656.24(b)(2)(ii), which is applicable herein, provides that, with the exception of job opportunities for college or university teachers or aliens determined to be currently of exceptional ability in the performing arts,

[t]he Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed....

In its Brief in Support of Employer's Position, as filed with the Board, Employer's counsel concedes that the Department of Labor considers a bachelor's degree to be equivalent to two years of experience when a job applicant attempts to convert his degree into job experience. Employer argues, however, that when an applicant wishes to convert his job experience into a bachelor's degree, a different standard applies. As previously noted, however, Employer's reliance upon 8 C.F.R. §214.(h)(4)(iii)(D)(5) in making this argument is misplaced, as is his argument that twelve years of experience is required for work experience to be considered equivalent to a bachelor's degree.

U.S. applicant Hill submitted a resume which indicated he had experience as a systems administrator (one year); a director of information systems (three years), a manager of business and financial administration systems (two years) and a network manager and chief developer for all quality assurance systems (seven years). For over two years, he was a self-employed contractor of systems design and software engineering. His resume further indicated that further history and references were available on request, as well as listing eighteen years of experience in the technical background of systems design and software engineering. (AF 64-65).

The CO contends that Hill, although lacking a bachelor's degree, is qualified for the position at issue. Where the U.S. applicant clearly does not meet a stated job requirement the burden shifts to the CO to explain why the applicant is qualified through a combination of education, training or experience, despite his failure to meet the stated requirement. *Houston Music Institute, Inc.*, 1990-INA-450 (Feb. 21, 1991). In *Minecraft Software, Inc.*, 1990-INA-328 (Oct. 2, 1991), the U.S. applicant lacked experience in the job offered, but had an M.S. degree in electrical engineering, which was found to be the equivalent of two years of experience. In *External Resources International, Inc.*, 1990-INA-32 (Apr. 19, 1991), the Board affirmed the CO's explanation of why a U.S. worker's managerial experience could be considered the equivalent to the employer's requirement of a B.A. in Management, where the CO detailed the applicant's extensive management experience indicating an ability to do the job.

Here, the CO has similarly provided a compelling argument why U.S. applicant Hill, based upon his resume, appears to have experience which is equivalent to or exceeds the alternative requirements listed by Employer for the position at issue. It is apparent that Hill had sufficient training and experience such that he would be able to perform the duties of the position. His resume supports the CO's argument that Hill's work experience rendered him qualified for the position. Indeed, Employer does not argue that the experience Hill had was not relevant or inapplicable to the position at issue. Rather, Employer argues that Hill did not have enough years of that experience. Employer's argument in this respect, however, is based upon the erroneous argument that three years of work experience is needed to equal one year of college. However, this Board agrees with the CO's assertion, as made in the NOF, that a bachelors' degree is considered to be the equivalent to about two years of experience, and will apply that standard herein in determining that Hill was qualified.

Given the facts in this case, it appears that Employer has failed to establish a valid job-related reason for rejecting U.S. applicant Hill, a qualified U.S. worker. As found by the CO, Employer's questionnaire, first disclosed in rebuttal to the NOF, was an undisclosed requirement which cannot be considered herein as a valid reason to reject an applicant. Labor certification was properly denied

and the following Order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.